

7/30/01

THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.

Paper No. 11
TEH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Craft House Corporation**

Serial No. 75/573,277

Richard G. Martin of MacMillan, Sobanski & Todd, LLC for **Craft House Corporation**.

Leslie L. Richards, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

Before Hohein, Bottorff and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Craft House Corporation to register the mark BUILD N' PLAY for "toy model hobbycraft kits."^{1[1]}

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when applied to applicant's goods, so resembles the previously registered mark BUILD 'N PLAY for "toy tables, trays and chairs, and geometric

^{1[1]} Application Serial No. 75/573,277; filed October 19, 1998; alleging a bona fide intention to use the mark in commerce.

shapes, namely, blocks, numbers and letters usable therewith” as to be likely to cause confusion.^{2[2]}

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney filed briefs. Although applicant had requested an oral hearing, that request was subsequently withdrawn.

In any likelihood of confusion analysis, we look to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand and the evidence of record, including the similarity of the marks and the relatedness of the goods or services.

The marks in this case are essentially identical. The one, barely perceptible difference in the marks is the placement of the apostrophe to the right of the “N” in applicant’s mark and to the left of the “N” in registrant’s mark. The marks are otherwise identical in sound, appearance and meaning. Applicant does not dispute the identity of the marks but argues instead that registrant’s mark BUILD ‘N PLAY is not “highly distinctive.” Applicant reasons that although the mark “is arbitrary in relation to the identified goods,” the individual words “build and “play” are “relatively common words” and therefore entitled to only a narrow scope of protection.

^{2[2]} Registration No. 2,077,030; issued July 8, 1997.

The question is not simply whether, in the abstract, the mark is composed of common words but rather whether those words have a meaning in relation to the identified goods, or whether the mark is commonly used on the related goods and services of different companies. See, e.g., *National Cable Television Association, Inc. v. American Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ 1424 (Fed. Cir. 1991) [“Cable’s [plaintiff-appellant’s] argument that it can use ACE because ACE is a ‘weak’ mark, as an abstract proposition, is not only unpersuasive but essentially meaningless.”]. We note that the factor to be considered in determining likelihood of confusion, and specifically the strength of a mark, under *du Pont* is the “number and nature of similar marks in use on similar goods.” See *In re E. I. du Pont de Nemours & Co.*, *supra* at 567.

In this case, there is no evidence that BUILD ‘N PLAY is highly suggestive of the identified goods or that the mark is commonly used by others in related fields. Applicant has introduced no evidence of third-party registrations or uses of similar marks in the relevant market or any other evidence to support its claim that registrant’s mark is entitled to only a narrow scope of protection.^{3[3]}

We turn then to a consideration of the respective goods. The Examining Attorney argues that applicant’s toy model hobbycraft kits and registrant’s toy tables, trays and chairs, and geometric shapes, namely, blocks, numbers and

^{3[3]} There is no evidence in the record to support applicant’s claims that “[f]rom a trademark perspective, the field [of children’s toys] is very crowded” and that “[t]he same or similar marks are able to co-exist in the toy industry.” (Brief, p. 3).

letters usable therewith, are related in that they are both primarily “toys” and have some similar properties, and that the purchasers and channels of trade for the respective goods are the same. The Examining Attorney has made of record several third-party registrations which she claims illustrate that goods of the type herein may emanate from the same source.^{4[4]}

Applicant, on the other hand, argues that merely because the word “toy” appears in both identifications of goods and that the respective goods co-exist in the same broad industry does not mean they are related goods. It is applicant’s position that its model hobbycraft kits “are distinct” from registrant’s “tables, trays and chairs, and blocks, numbers and letters usable therewith” in that, unlike registrant’s goods, applicant’s kits will require a certain level of skill to assemble “into finished models which are collected and developed into a series.” Applicant maintains that assembly “is not a key feature of [registrant’s] goods” and that those goods are intended for use by inexperienced and unskilled young children. Applicant further argues that the customers for applicant’s goods are adults and older children whereas the customers for registrant’s goods are adults who purchase the goods for use by toddlers and young children; that applicant’s goods would not be sold in the same sections of stores alongside other goods designed for toddlers and young children, but instead grouped together in

^{4[4]} The Examining Attorney has attached additional third-party registrations to her appeal brief. Since this evidence is untimely, it has not been considered. See Trademark Rule 2.142(d).

model or hobbycraft sections of the stores; and that purchasers of toddler play furniture and toys are likely to exercise considerable care in their purchasing decisions.

Where the marks are essentially identical, as in this case, it is only necessary that there be a viable relationship between the goods in order to support a holding of likelihood of confusion. In *re* Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983).

It is true that there are specific differences in the respective products and they are not competitive. However, the question is not whether purchasers can differentiate the goods themselves but rather whether purchasers are likely to confuse the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Thus, it is not necessary that the goods of the applicant and registrant be similar or even competitive to support a finding of likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Notwithstanding applicant's arguments, we find that there is at least a viable relationship between these goods. Admittedly, the goods are essentially different and are directed to different age groups. Registrant's goods, in this

regard, consist of toy furniture and geometric shapes, namely blocks, numbers and letters usable therewith, and are undoubtedly intended for use by toddlers or young children.^{5[5]} Applicant's goods, on the other hand, are toy model hobbycraft kits and it is reasonable to assume that those kits are used by older children. Nevertheless the respective goods are related to the extent that registrant's blocks, numbers and letters, and applicant's toy model kits are both activity toys, with both requiring age-appropriate levels of cognitive and manual skills and having what the Examining Attorney describes as building or construction properties. These are meaningful similarities when we consider that such goods are sold under identical marks to the very same purchasers in the very same stores. Although the intended users of the respective toys may be different, the primary purchasers thereof, that is the adults who would actually buy the toys, are the same. Moreover, both toys can typically be found in such retail outlets as toy stores and toy departments of other stores. We have no evidence that applicant's and registrant's toys typically would be displayed in different aisles or sections of a toy department nor do we find that to be an important consideration since these products may not even be purchased at the same time. The typical purchasers for these goods, for example, parents who had previously purchased registrant's BUILD 'N PLAY furniture and blocks for their younger child, upon encountering applicant's toy model kits under the

^{5[5]} However, we disagree with applicant's characterization of registrant's furniture as "miniature" as that word suggests doll-

identical BUILD N' PLAY mark for their older child, regardless of where or even when they found it in the store, are likely to assume that that registrant has a line of activity toys under the mark BUILD 'N PLAY which appeal to different age groups or that the goods are associated with or sponsored by the same company.

We note, in this regard, that the third-party registrations made of record by the Examining Attorney show that at least one company has registered the same mark for both building blocks and hobby kits and that two other companies have registered their marks for hobby kits as well as toys which would be used by toddlers or young children. Although these registrations are not evidence of use of the marks in commerce, they have probative value to the extent that they suggest that, despite the differences in the identified goods, they are of a type which may emanate from a single source. See, e.g., *In re Albert Trostel & Sons Co.*, *supra* at 1785-1786; and *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988).

Moreover, both applicant's and registrant's toys are relatively inexpensive and are therefore likely to be purchased casually and on impulse, thus increasing the risk of confusion. *Kimberly-Clark Corp. v. H. Douglas Enter., Ltd.*, 774 F.2d 1144, 1146, 227 USPQ 541, 542 (Fed. Cir. 1985). While purchasers may care about the toys they are purchasing for use by their children and therefore exercise a certain degree of care in selecting such products, they are not necessarily

size furniture rather than child-size furniture.

sophisticated purchasers or likely to exercise a high degree of care in terms of examining the trademarks.

Finally, to the extent that there is any doubt on the issue of likelihood of confusion, it is settled that such doubt must be resolved in favor of the prior registrant. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

Decision: The refusal to register is affirmed.